

J. Y. Interpretation No.441 (November 28, 1997) *

ISSUE: Where the Rules established by the Executive Yuan under the Act of Encouragement of Investment allow income tax credit for expenses paid by productive enterprises for research work performed by research institutions, is the Ministry of Finance directive contradictory to such Rules and as a result unconstitutional in requiring that such research institutions be limited to those controlled by government-approved foundations?

RELEVANT LAWS:

Article 19 of the Constitution (憲法第十九條); Article 34-1, Paragraphs 1 and 2 of the Act of Encouragement of Investment (獎勵投資條例第三十四條之一第一項、第二項); Act for Upgrading Industries (促進產業升級條例); Article 2, Subparagraphs 1, 8 and 10 of the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment (生產事業研究發展費用適用投資抵減辦法第二條第一款、第八款、第十款); Tai-Tsai-Shui No. 7549464 Directive of Ministry of Finance dated August 16, 1986 (財政部七十五年八月十六日台財稅字第七五四九四六四號函); Regulation Governing the Reduction of Expenditures for Corporate Research and Development, Talent Training and Establishing International Brand as

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Investment (公司研究與發展人才培訓及建立國際品牌形象支出適用投資抵減辦法)。

KEYWORDS:

productive enterprise (生產事業), business income tax (營利事業所得稅), research and development expenses (研究發展費用), foundation (財團法人), private corporate bodies (私法人), freedom of choice (選擇自由), tax credit; credit against tax (抵減稅額).**

HOLDING: To encourage productive enterprises to engage in research and development, upgrade their technological standards and increase their productivity, the Executive Yuan established on September 18, 1985, the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment under authorization of Article 34-1 of the Act of Encouragement of Investment. Under Article 2, Paragraph 8, of the Regulation, "research and development expenses" are defined as the expenses paid by a productive enterprise for the purpose of research leading to the creation or design of any new product under a contract with a university, college, or re-

解釋文：為獎勵生產事業從事研究發展，提昇技術水準，增進生產能力，行政院於中華民國七十四年九月十八日，依獎勵投資條例第三十四條之一授權訂定之生產事業研究發展費用適用投資抵減辦法，其第二條第八款規定，生產事業為研究新產品，委託大專校院、研究機構辦理研究工作所支出之費用，為研究發展費用，得抵減當年度應納營利事業所得稅額。所稱研究機構，依財政部七十五年八月十六日台財稅字第七五四九四六四號函釋，係指經政府核准登記有案之財團法人所屬之研究機構而言，僅就私法人而為說明，固欠周延。惟上開辦法第二條抵減事由共有十款，經政府核准登記有案之財團法人所屬研究機構以外之研究機構，仍得依該辦法同條第十款規定申請專案認定獲致

search institution for doing such research work, and may be credited against the business income tax payable for that taxable year. Although the Ministry of Finance Directive Tai-Tsai-Shui No. 7549464 issued on August 16, 1986, is, in our opinion, far from being sufficiently comprehensive in defining "research institution" to include those research institutions under the control of foundations approved by and registered with the government, meaning private corporate bodies only, Article 2 of said Regulation, which includes altogether 10 paragraphs enumerating circumstances in which income tax may be credited, makes it possible for productive enterprises to apply under Paragraph 10 of said Article for special case-by-case approval for tax reduction or exemption if the research work is performed by a research institution other than those controlled by foundations approved by and registered with the government. Thus, the Directive of the Ministry of Finance does not affect the interest of productive enterprises in the tax benefits available and is not in conflict with aforementioned Regulation, nor does it

減免，未影響生產事業租稅優惠之權益，是財政部該號函釋與上開辦法並未牴觸，於憲法第十九條亦無違背。至生產事業委託研究之選擇自由因而受限及不在抵減範圍之研究機構可能遭受不利影響，仍應隨時檢討改進。

contradict Article 19 of the Constitution. Nonetheless, the situation that the freedom of choice of productive enterprises to appoint institutes to do research is thus constrained and the likelihood of adverse effect that may be caused by the Directive to those institutions precluded from the application of the law of tax credit must be reviewed from time to time so that the situation may be improved.

REASONING: To encourage productive enterprises to engage in research and development, upgrade their technological standards and increase their productivity, the Act of Encouragement of Investment (now replaced by the Act for Upgrading Industries upon expiration of its period of implementation on December 31, 1990) was amended on December 31, 1984, to add Article 34-1, Paragraph 1, of which the first sentence provides that, “where the research and development expenses paid by a productive enterprise in the year for which income tax return is filed exceeds the greatest amount spent during any of the five preceding years, an amount equal to twenty percent of the

解釋理由書：為獎勵生產事業從事研究發展，提昇技術水準，增進生產能力，七十三年十二月三十日增訂獎勵投資條例（施行期間至七十九年十二月三十一日屆滿，另經制定促進產業升級條例）第三十四條之一第一項前段規定，生產事業申報年度之研究發展費用超過以往五年度最高支出之金額者，其超出部分百分之二十得抵減當年度應納營利事業所得稅額。同條第二項又規定前項研究發展費用抵減之適用範圍，由行政院定之。行政院依此授權於七十四年九月十八日訂定生產事業研究發展費用適用投資抵減辦法（現依促進產業升級條例另訂定公司研究與發展人才培訓及建立國際品牌形象支出適用投資抵減辦法），其第二條第八款規定生產事業

portion of the expenses over such greatest amount may be credited against the business income tax payable for that year.” Paragraph 2 of the same Article provides further that “the scope to which such tax credit for research and development expenses may be applied shall be established by the Executive Yuan.” Pursuant to this authorization, the Executive Yuan issued on September 18, 1985, the Regulation Governing the Reduction of Expenditure of the Productive Industry Outlays for Research and Development as Investment (now replaced by the Regulation Governing the Reduction of Expenditures for Corporate Research and Development, Talent Training and Establishing International Brand as Investment formulated under the Act for Upgrading Industries). Under Article 2, Paragraph 8, of the Regulation, “research and development expenses” are defined as the expenses spent by a productive enterprise for the purpose of research leading to the creation or design of any new product under a contract with a university, college, or research institution for carrying out such research work, and may be credited against the

為研究新產品，委託大專校院、研究機構辦理研究工作所支出之費用為研究發展費用，得抵減當年度應納營利事業所得稅額。所稱研究機構，依財政部七十五年八月十六日台財稅字第七五四九四六四號函釋，係指經政府核准登記有案之財團法人所屬之研究機構而言，僅就私法人而為說明，固欠周延。惟生產事業為研究新產品、改進生產管理技術、改善製程、節約能源、防治污染之研究及產品市場調查所支出之費用符合同條所列各款情形之一者，均屬研究發展費用，得用以抵減當年度應納營利事業所得稅額。個人在生產事業研究發展單位兼職，從事研究者，其費用得適用同條第一款規定；經政府核准登記有案之財團法人所屬研究機構以外之研究機構，經受委託辦理研究工作者，其費用如確屬必要，亦得適用同條第十款規定，申請專案認定獲致減免，未影響生產事業租稅優惠之權益，是財政部該號函釋與上開辦法並未牴觸，於憲法第十九條規定租稅法律主義之本旨亦無違背。至生產事業委託研究之選擇自由因而受限及不在抵減範圍之研究機構可能遭受不利影響，仍應隨時檢討改進。

business income tax payable for that year. Although the Ministry of Finance Directive Tai-Tsai-Shui No. 7549464 issued on August 16, 1986, is, in our opinion, far from being sufficiently comprehensive in defining “research institution” to include those research institutions under the control of foundations approved by and registered with the government, meaning private corporate bodies only, expenses spent by any productive enterprise for research in developing new products, improving production management and technologies, perfecting manufacturing processes, saving energy, controlling pollution and for marketing surveys for its products are considered research and development expenses so long as the expenses are paid for any of the purposes enumerated in one of the subparagraphs of said Article and may be applied for credit against the business income tax payable for that particular year. In case of expenses paid by a productive enterprise for research work performed by an individual working part-time at its research and development unit, Paragraph 1 of the same Article may be applicable. Even if the research work is

undertaken by a research institution other than one controlled by a foundation approved by and registered with the government, it is still possible for the productive enterprise to apply under Paragraph 10 of said Article for special case-by-case approval for tax reduction or exemption if the expenses spent are truly necessary. Thus, the Directive of the Ministry of Finance does not affect the interest of productive enterprises in the tax benefits available and is not in conflict with the aforementioned Regulation, nor does it contradict Article 19 of the Constitution. Nonetheless, the situation that the freedom of choice of productive enterprises to appoint institutes to do research is thus constrained and the likelihood of adverse effect that may be caused by the Directive to those institutions precluded from the application of the law of tax allowance must be reviewed from time to time so that the situation may be improved.

Justice Jyun-Hsiung Su filed dissenting opinion.

Justice Tieh-Cheng Liu filed dissenting opinion.

本號解釋蘇大法官俊雄、劉大法官鐵錚分別提出不同意見書。